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No. 91-768

In the Supreme Court of the United States

OCTOBER TERM, 1991

EMIL CHRISTIAN GREMLICH, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

SRUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
LOWELL V. STURGILL, JR.
Attorneys
Department of Justice
Washintgon, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether *Feres* v. *United States*, 340 U.S. 135 (1950), bars petitioner's Federal Tort Claims Act action arising out of alleged medical malpractice occurring incident to petitioner's military service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a), is unreported, but the decision is noted at 937 F.2d 597 (Table). The opinion of the district court (Pet. App. 5a-13a), is also unreported.

JURISDICTION

The judgment of the court of appeals was filed on June 12, 1991. A petition for rehearing was denied on July 10, 1991. The petition for a writ of certiorari was filed on September 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On March 4, 1957, petitioner enlisted in the United States Army Reserves for a six-year term of duty. On October 27, 1957, he was seriously injured in an

automobile accident while returning home from active duty training. At the time, petitioner was on active duty status with the Reserves, and he was released to his Reserve unit the next day. After first receiving treatment in a civilian hospital, petitioner was transferred to the Valley Forge Army Hospital on December 12, 1957. There, he received treatment from military personnel until May 27, 1959. While hospitalized, petitioner received the pay, allowances, and hospital benefits provided to members of the Regular Army pursuant to 10 U.S.C. 3687 and 3721 (1982). Pet. App. 6a.

On November 20, 1989, petitioner filed the present action against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* He alleged that he received negligent medical treatment from military personnel at Valley Forge Army Hospital, and that he sustained serious and permanent injuries as a result. Pet. App. 6a. The United States District Court for the Eastern District of Pennsylvania granted summary judgment for the United States, Pet. App. 5a, relying on *Feres* v. *United States*, 340 U.S. 135, 146 (1950), which bars FTCA claims "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The court reasoned that *Feres* barred petitioner's claims because "the alleged medical malpractice occurred while [he] was an active member of the United States Army Reserves." Pet. App. 5a. As the court noted, "medical treatment by military personnel on active members of the armed forces has consistently been held to be an activity incident to service and, hence, beyond the scope of the FTCA." Pet. App. 11a (citing cases). The court of appeals affirmed in an unpublished memorandum opinion, agreeing that

"the injuries which [petitioner] has suffered must be regarded as incident to his military service." Pet. App. 4a.

ARGUMENT

The decision of the court of appeals adheres to this Court's decisions applying the *Feres* doctrine and does not conflict with any other court of appeals decision; further review is unwarranted.

1. Petitioner argues that several decisions of this Court have eroded the rationale of *Feres*, limiting the applicability of the *Feres* doctrine to claims that would adversely affect military discipline. Petitioner further contends that the prosecution of his medical malpractice claim would not impair military discipline. Pet. 4-9. These contentions are without merit.

Petitioner's proposed modification of *Feres* is foreclosed by this Court's decision in *United States* v. *Johnson*, 481 U.S. 681, 683 (1987), an FTCA action alleging that a Coast Guard pilot's death resulted from the Federal Aviation Administration's negligent radar operations. Finding the "primary justification" underlying *Feres* to be "military discipline," the court of appeals in *Johnson* held that *Feres* was inapplicable because the actions of the alleged tortfeasor did not implicate any conduct of the military. *Id.* at 684. This Court rejected that narrow view of *Feres*, emphasizing that it has "never deviated" from the principle that the FTCA does not extend to injuries that "arise out of or are in the course of activity incident to service." *Id.* at 686 (quoting *Feres*, 340 U.S. at 146). The Court explained the "three broad rationales," *id.* at 688, underlying *Feres*: First, because of the "distinctively federal" relationship between servicemembers and the government, it would "make[] no sense" to predicate the government's liability for servicemembers' tort claims upon

"the fortuity of the situs of the alleged negligence." *Id.* at 689.[1] Second, Congress has provided "generous statutory disability and death benefits" for service-related injuries; hence, it is implausible "that Congress would have * * * at the same time contemplat[ed] recovery for service-related injuries under the FTCA." *Id.* at 689-690. Third, an FTCA action "based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." *Id.* at 691. Such litigation, the Court observed, "could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." *Ibid.*

The courts below properly held that petitioner's claim was barred under the "incident to service" test, rather than applying petitioner's alternative military discipline standard.[2] Medical malpractice claims

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[1] In an FTCA action, the district court's jurisdiction extends to "claims against the United States, for money damages, * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see 28 U.S.C. 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.").

[2] This Court has repeatedly declined to modify the "incident to service" test consistently applied since *Feres*. See, *e.g.*, *United States* v. *Stanley*, 483 U.S. 669, 681-684 (1987); *Johnson*, 481 U.S. at 688. In addition, the Court recently denied certiorari in two cases in which the petitions presented the question whether the Court should overrule *Feres*. See *Kitowski* v. *United States*, 112 S. Ct. 371 (1991); *Sonnenburg* v. *United States*, 111 S. Ct. 782 (1991). We have served copies of our briefs in opposition in *Kitowski* and *Sonnenburg* on petitioner here.

brought by servicemembers against the military are "incident to service." Two companion cases decided with *Feres* involved medical malpractice claims. *Feres*, 340 U.S. at 137. The courts of appeals, moreover, have consistently held that such claims are barred under *Feres*. See, *e.g.*, *Atkinson* v. *United States*, 825 F.2d 202, 205-206 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988); *Lampitt* v. *United States*, 753 F.2d 702, 703 (8th Cir.), cert. denied, 472 U.S. 1029 (1985).

Claims such as petitioner's directly implicate the three *Feres* rationales identified by this Court in *Johnson*. First, medical treatment of servicemembers by military doctors occurs within the context of the "distinctively federal" relationship, *Johnson*, 481 U.S. at 689, between the military and its personnel. Second, because petitioner received the allegedly negligent medical treatment while on active status with the Reserves, his injuries fell within the alternative compensation scheme Congress has provided for the military. See *id.* at 689-690. Third, the prosecution of petitioner's claim may affect military discipline "in the broadest sense of the word" by requiring judicial inquiry into "military judgments and decisions." *Id.* at 691. Petitioner suggests that the appropriate inquiry on remand would address not only decisions relative to his medical care, but also the reasons for his removal from a civilian to a military hospital. Pet. 11-12. By "raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military command[]," petitioner's suit might "disrupt the military regime." *United States* v. *Stanley*, 483 U.S. 669, 682-683 (1987).

2. Petitioner next contends that *Feres* does not bar his suit because he was not on "active duty" at

the time of his automobile accident. Pet. 11-13. Petitioner confuses "on duty" status with "active duty" status, the latter of which invokes *Feres*. As an active duty member of the Reserves, petitioner was subject to *Feres*. See, *e.g.*, *Anderson* v. *United States*, 724 F.2d 608, 610 (8th Cir. 1983); *Mattos* v. *United States*, 412 F.2d 793, 794 (9th Cir. 1969). In addition, petitioner was transported to and treated at the Army hospital solely because of his military status, and the Army doctors were subject to military orders when they treated him. Hence, petitioner's injuries arose "incident to service," even though he was not directly engaged in military activities at the time. See, *e.g.*, *Persons* v. *United States*, 925 F.2d 292, 296 (9th Cir. 1991) (servicemember's off-duty status at time of alleged medical malpractice does not eliminate *Feres* bar); *Appelhans* v. *United States*, 877 F.2d 309, 311-312 (4th Cir. 1989) (*Feres* bars malpractice claim against military doctors by servicemember who was on excess indefinite leave when the alleged tort occurred); *Sidley* v. *United States Department of Navy*, 861 F.2d 988, 990 (6th Cir. 1988) (applying *Feres* to claim against Navy doctors, even though initial injury occurred while servicemember was off duty); see also *United States* v. *Shearer*, 473 U.S. 52, 57 (1985) (*Feres* applies to claim arising out of off-base kidnapping and murder of off-duty servicemember by another servicemember).

3. Even if this Court were to reverse the decision of the court of appeals concerning the *Feres* doctrine, petitioner would not be entitled to relief on remand. The medical treatment of which petitioner complains terminated on May 27, 1959. Pet. App. 6a. Under 28 U.S.C. 2401(a), every civil action against the United States "shall be barred unless the complaint

is filed within six years after the right of action first accrues." Hence, petitioner's action would be untimely under Section 2401(a).

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
LOWELL V. STURGILL, JR.
Attorneys

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